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Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-2009

In the Supreme Court

OF THE

United States

October Term, 1985

DEL MONTE CORPORATION, a New York corporation, R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation, DEL MONTE SNACKS, INC., a California corporation, Petitioners,

vs.

BARBARA BLAU, RAM BLAU, ANN MAYO and RICHARD LINDGREN, individually and on behalf of all other former employees of DEL MONTE SNACKS, INC., similarly situated, Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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EDITOR'S NOTE

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RESPONDENTS' BRIEF IN OPPOSITION TO MOTION OF ORGANIZATION RESOURCES COUNSELORS, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF

A. INTRODUCTION

Respondents Barbara Blau, Ram Blau, Ann Mayo and Richard Lindgren, individually and on behalf of all other former

employees of Del Monte Snacks, Inc., similarly situated, hereby oppose the motion of Organization Resources Counselors, Inc. for leave to file an amicus curiae brief in support of the petition for a writ of certiorari filed herein. Respondents base their opposition on the ground that counsel for said amicus curiae, Epstein Becker Borsody and Green ("Epstein, Becker"), suffers from a basic and irremediable conflict of interest with respect to respondents and, accordingly, is disqualified from representing any party whose interests are materially adverse to respondents. The factual and legal bases for this opposition are set forth in the following affidavit and legal argument.

B. AFFIDAVIT OF DAVID W. BAER

STATE OF CALIFORNIA)
)
CITY AND COUNTY OF SAN FRANCISCO)

I, David W. Baer, being duly sworn, certify:

1. I am an attorney in the law firm of Hanson, Bridgett, Marcus & Vlahos, counsel for respondents herein. I have had responsibility with respect to this matter since June of 1982. If called as a witness, I would be competent to testify to all of the matters stated herein.

2. In May of 1985, six former attorneys of this firm, Ross E. Stromberg, Gerald M. Hinkley, Diane W. Carter, Thomas C. Geiser, Mark T. Schieble and Dena R. Belinkoff joined the San Francisco office of Epstein, Becker, counsel for proposed amicus curiae Organization Resources Counselors, Inc. Four of these attorneys, Mssrs. Stromberg, Hinkley, and Geiser and Ms. Carter, were partners in this firm and, to the best of my knowledge, are now partners in the Epstein, Becker firm. Mr. Stromberg was a named partner in this firm and is now

a named partner in Epstein, Becker's San Francisco office.

3. Respondents' initial consultation with their present counsel occurred on April 16, 1981. Commencing one week later, and until May of 1983, Mr. Geiser performed substantial legal services for respondents in this matter including, but not limited to, attending client meetings, one of which was conducted on a class-wide basis, participating in telephone conferences with the clients, corresponding with the clients, obtaining and reviewing documents provided by the clients and participating in strategy meetings regarding the potential theories of liability (particularly with respect to ERISA) and the preparation of the complaint. Mr. Geiser played a central role in the development of this case on behalf of respondents, his principal function being to investigate and develop the background facts in order to determine and analyze the possible causes of action to be asserted against petitioners. In this process, Mr. Geiser acquired material confidential information from respondents and became thoroughly

familiar with the relevant facts in this case.1/

4. In view of Mr. Geiser's involvement in the formative stages of this case, I continued to advise him of developments as they occurred, including strategic considerations, legal themes presented and pertinent confidential information which had been revealed to me by the clients.

5. Mr. Geiser was thoroughly familiar with a majority of the documents placed in this office's files for this case prior to the filing of the complaint and, specifically, had reviewed virtually all of the documents obtained from the clients prior to that time. In addition, the other five attorneys, who are now members of the Epstein, Becker firm, had free access to the files at all times while working at this firm.

6. I have spoken to the class representatives, Barbara Blau, Ram Blau,

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1/ This office maintains billing records in the normal course of business showing Mr. Geiser's activity in the case, which records can be produced for the Court upon request.

Ann Mayo and Richard Lindgren regarding this matter. They requested me to inform the Court that they do not consent to the representation of Organization Resources Counselors, Inc. by Epstein, Becker, or any of its attorneys, for the purpose of asserting an interest which is materially adverse to respondents. Specifically, they do not consent to the filing or consideration of the amicus curiae brief, prepared and submitted by Epstein, Becker.

7. On July 18, 1985 I became cognizant of the conflict of interest described above and immediately telephoned amicus curiae's counsel of record, Henry Rose, to inform him of the same. He was out of the office and I asked that he be given a message stating our position that Epstein, Becker was disqualified due to Mr. Geiser's prior involvement in the case. On July 19, 1985 I spoke with Mr. Rose over the telephone and requested that he refrain from filing the proposed amicas curiae brief. Mr. Rose told me that the brief had already been filed earlier that day so I asked him to voluntarily withdraw instant motion. Mr. Rose indicated that

he would not do so and I therefore told him that this office intended to oppose the motion.

Dated: August 8, 1985

DAVID W. BAER

Subscribed and sworn to before me this 8th day of August, 1985.

Notary Public in and for the City and County of San Francisco, State of California

C. **LEGAL ARGUMENT**

No lengthy discussion of the legal principles requiring disqualification of amicus curiae's counsel is necessary. Rule 1.10 of the American Bar Association Model Rules of Professional Conduct sets forth the circumstances in which a firm is disqualified when it has associated a lawyer from another firm. Specifically, Rule 1.10(b) provides:

> "When a Lawyer becomes associated with a firm.[2/] the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information

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2/ With respect to the definition of a firm, the ABA Comment to Rule 1.10 indicates that where two or more attorneys ". . . present themselves to the public in a way suggesting they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules." ABA/BNA Lawyer's Manual on Professional Conduct at 01:125 (1984). Thus, although Epstein, Becker may have various offices, including those located in San Francisco and Washington, D.C., it should still be regarded as a single firm.

> protected by Rules 1.6 and 1.9(b) that is material to the matter."

In general, information protected by Rules 1.6 and 1.9(b) is that which "relate[s] to the representation," other than that information which the client has expressly or impliedly authorized to be revealed.

As a means of balancing the competing interests of the former client (preserving confidentiality and loyalty), the present client (having a reasonable choice of legal counsel) and attorneys (maintaining freedom to change employment), Rule 1.10(b) does not establish a per se standard for disqualification based on an attorney's prior association with a firm which represents a client against whom that attorney's present firm asserts an adverse interest. Rather, the rule requires a factual inquiry -- did the lawyer involved have actual knowledge of confidential information material to the matter? See, ABA/BNA Lawyer's Manual for Professional Conduct, pp. 01:126-127 (1984). Even under this relaxed

standard,[3] it is evident that Organization Resources Counselors, Inc.'s counsel is disqualified.

3/ The majority of the circuits to address the issue have adopted a far more stringent test, and hold that if "a substantial relation" exists between the pending suit and the matter in which the attorney previously represented the client, there is a conclusive presumption that an attorney who represented the client in the former matter has learned facts that require his disqualification. See, e.g., In re Currugated Container Antitrust Litigation, 659 F.2d 1341, 1347 (5th Cir. 1981); Trone v. Smith, 62 F.2d 994, 998-999 (9th Cir. 1980); Arkansas v. Dean Foods Products Co., 605 F.2d 380, 384 (8th Cir. 1984) overruled on appealability issue, In re Multi-piece Rim Products Liability Litigation, 612 F.2d 377, 378 (8th Cir. 1980) vacated sub nom. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 754 (2d Cir. 1975) overruled on appealability issue, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980); c.f. Kevlik v. Goldstein, 724 F.2d 844, 851 (1st Cir. 1984). Here, the matters are not merely "substantially related"; rather, the conflict arises out of the very same case. C.f. Hull v. Celanese Corporation, 513 F.2d 568 (2d Cir. 1975).

As the preceding Affidavit of David W. Baer establishes, Mr. Geiser, formerly a member of the Hanson firm which represents respondents, and now a member of the Epstein, Becker firm representing amicus curiae, does have actual knowledge of confidential information which is material to respondents' representation in this matter. Indeed, Mr. Geiser not only had access to confidential information, but directly communicated with the clients face-to-face, over the telephone and through the mails, and was even responsible for obtaining and analyzing the basic facts and documents supporting respondents' cause of action against petitioners.

It is equally plain that the interests of Organization Resources Counselors, Inc. are materially adverse to respondents' interests. The amicus curiae brief supports the same petition for a writ of certiorari which respondents oppose and, not surprisingly, the legal arguments raised in the amicus curiae brief are directly contrary to those made by respondents in their brief. Accordingly, the result of

applying Model Rule 1.10(b) to the facts of this case are clear: Epstein, Becker should be disqualified and amicus' motion for leave to file the amicus curiae brief prepared by that firm should, therefore, be denied.

Respondents do not mean to suggest that Mr. Geiser (or any of the other five former members of the firm representing respondents) has in fact violated his professional responsibility to preserve respondents' confidences. Nonetheless, Mr. Geiser's fiduciary responsibility to respondents while a member of this firm is unquestionably in conflict with his, and his firm's, present fiduciary responsibilities to their current client. As the Ninth Circuit aptly observed:

> "[d]isqualification does not depend upon proof of the abuse of confidential information. Because of the sensitivity of client confidence and the profession's institutional need to avoid even the appearance of a breach of confidence, disqualification is required when lawyers change sides in factually related cases." Trone v. Smith, 621 F.2d 994, 1001 (9th Cir. 1980).

Consequently, if the attorney is disqualified, ". . . the firm as a whole is disqualified whether or not its members were actually exposed to the information." Id. at 999.

Rule 1.10(b) is consistent with this principle and does not permit any exception to disqualification based on a showing that the attorney did not reveal confidential information to his or her new associates. Any such exception, particularly in the context of the same litigation out of which the conflict arises, would merely invite abuse and, as importantly, because of the appearance of impropriety, would foster distrust of the profession.

D. CONCLUSION

For the foregoing reasons respondents respectfully submit that Organization Resources Counselors, Inc.'s motion for leave to file an amicus curiae brief should be denied.

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